FILE COPY

No. 19

IN THE

Supreme Court of the United States

OCTOBER TERM—1938

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., *et al.*
Petitioners

against

NATIONAL LABOR RELATIONS BOARD
Respondent

and

UNITED ELECTRICAL AND RADIO WORKERS OF AMERICA affiliated with the COMMITTEE FOR INDUSTRIAL ORGANIZATION
Intervenor-respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

WILLIAM L. RANSOM
WESLEY A. STURGES
P. M. BERKSON
Counsel for Petitioners

WHITMAN, RANSOM, COULSON & GOETZ
Solicitors for Petitioners
No. 40 Wall Street
New York City

PRESS OF JUDD & DETWEILER, INC., WASHINGTON, D. C.

CONTENTS IN REPLY

IN THE

Supreme Court of the United States

OCTOBER TERM—1938

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., *et al.*

against

NATIONAL LABOR RELATIONS BOARD, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

The brief for the Board does not meet, as we see it, the issues presented by the Board's action and the opinion of the Court below. Perhaps conveniently, the Board's brief is virtually silent as to the Court's considered criticisms of the Board's actions in this proceeding, and does not face the issues which now are here.

NOTE: At the time of writing this reply brief (October 12th and 13th), briefs in this cause had been received from the Board (on October 11th), the "United" (intervening CIO affiliate), the "Brotherhood" (American Federation of Labor affiliate), and the American Federation of Labor. The brief of the United is based in very material respects upon misstatements of the record, as shown graphically in an Appendix on pages 25-28, *post*. The arguments of the Board and the United are generally along parallel lines, and this reply brief will discuss their *principal* contentions, for the most part as stated in the Board's brief.

1

As to the Board's Argument for Its Jurisdiction

The Board's brief suggests no boundaries, and would leave no boundaries, between National and State jurisdiction over labor relations and practices. Under the Board's present argument, its jurisdiction would exist at its own option fortified only by its own findings (in little, if anything, more than recitals in the language of the statute), and would be virtually co-extensive with industrial activity.

We have urged that, in a case of this character, the controlling jurisdictional questions are (1) as to whether or not the National Labor Relations Act is to be construed by this Court as having undertaken to delegate to the Board jurisdiction over employers who were not claimed below to be engaged in "commerce" as defined in the Act [1] and who are by their organization, scope and nature of business predominantly of local concern to the State and local governments which regulate them plenarily; and (2) whether the Act, if it is to be so construed and applied, is a constitutional exercise of the powers of the Congress. We have understood this Court to point out, in the *Jones & Laughlin* decision and the others which have followed it, that the Act here is not to be construed and applied so as to destroy "the balance of the constitutional grants and limitations", and may not apply to wholly intra-state activities unless "their control is" essential or appropriate to protect commerce from direct burdens and obstructions.

In the Board's brief as we read it, there is substantially no heed given to these questions as to the statute, no significance and practical effect ascribed to the reiterated statements of this Court.

---

[1] The Court below said (R. 1739): "It is not contended that the petitioners are themselves engaged in commerce as so defined [in the Act]."

The Board's formula for establishing its own jurisdiction

The Board's brief does offer a mechanical, perhaps a more simple, standard for testing its jurisdiction or for avoiding or limiting judicial consideration of its determinations as to its jurisdiction. The full implications of the Board's *present* and self-executing formula should be noted, as they would lead to consequences far beyond the instant case.

As its major premise, the Board contends that its jurisdiction over a local enterprise is determined by the question: "Would 'stoppage of * * * operations by industrial strife' in that enterprise result in substantial interruption to or interference with the free flow of interstate commerce?" (Board's Brief, page 19). It introduces its minor premise with a preliminary but highly significant observation that "To the extent necessary to answer that question, the test is determined by the facts with respect to the particular enterprise" (Board's Brief, page 19). Then follows the Board's exposition and argument—a statement as to the "magnitude" of the petitioners' operations and the volume of some of their customers' interstate commerce which, may be dependent upon the continuity of their operations—that a cessation of petitioners' operations as a result of industrial strife would indubitably interfere with and obstruct the "free flow of commerce" carried on *by those customers*. From this, the conclusion is derived that the Board's assertion of its jurisdiction should be validated and enforced by this Court.

In other words, the contentions at one time urged before this Court in behalf of the Board, to the effect that the record must show that there is a reasonable probability that the labor practices will cause strikes with an intent to interfere with commerce, and that *if* such strikes "do

develope they will have a NECESSARY EFFECT of burdening and obstructing commerce," etc., are no longer urged. Emphasis is no longer placed by the Board on the interstate structure and organization of an industry and the need for a regulation as broad in scope as the scale of the operations. The present position of the Board's counsel is that if the Board makes a finding that the "stoppage of • • • operations by industrial strife" in a particular enterprise would result in what the Board regards as a substantial interruption or interference with interstate commerce, even though it be commerce carried on wholly by others, the Board has jurisdiction.

A few employees belonging to a minority labor organization can file a charge against a purely local employer; the National Board need only to find that a strike and stoppage of operations by the employer would obstruct or interfere with commerce, and the Board has thereby given itself jurisdiction to hear and determine the charge. The Board here made a finding couched in the language of the statute "that the activities of the respondents • • • tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce" (R. 125). Cf. Section 2(7) of the Act. By a similar process, virtually any employer can be brought under the Board's jurisdiction at the Board's option.

Such a formula ignores vital constitutional elements

Any plausibility which the Board's thesis may gain from over-simplification should not enjoy unearned regard. We ask: Why is the test of "stoppage of • • • operations by industrial strife" the point of inquiry as to the jurisdiction of the Board over an employer? Why does not the inquiry appropriately start further back; namely, *whether or not, in the absence of action by the National Board, the "unfair labor practices" under consideration are sufficiently*

likely, under the circumstances of the case, to result in a stoppage of operations of these petitioners, so as to establish a clear need and justification for the action of the National Board in taking jurisdiction of the petitioners with respect to those alleged practices, in order to protect the free flow of commerce?

The Board's syllogism ignores altogether the absence of evidence and findings that *its own action* is necessary in order to prevent "industrial strife" and "stoppage of * * * operations," etc. There are no findings or evidence here that any possible hazard of industrial strife which might result in stoppage of operations would not be adequately and effectively dealt with by the State Board. Indeed, we challenge anyone to read this record open-mindedly and escape the conclusion that the intervention of the National Board not only was wholly unnecessary for preventing industrial strife and averting any stoppage of operations, but also that the intervention and action of the National Board, its abrogation of contracts providing for arbitration, etc., tended rather to foment strife and to interject a danger of stoppage where no such danger existed before.[1] In any event, the record shows no reason for *assuming* that any unfair labor practices and their effects would be permitted by the State Board and the State and local authorities to develop any stoppage of service, as the continuity of the petitioners' service is a paramount concern of the State.

---

[1] As the Board's brief refers in many footnotes (*e.g.*, on pages 4, 21, 23, 46) to papers and documents not in the record and subsequent to it, we refer to *The New York Times* for October 26, 1937, in which it appeared that the CIO affiliate which filed the charge here undertook to call a "strike" *while its charge was pending before the Board.* The number of employees involved in the "walk-out" was so few that their leaving had no effect on the continuity of service. The police and local Courts dealt with such disorders as were attempted. At about the same time, a controversy involving the laying off of 754 members of the Brotherhood was settled amicably by arbitration under the contracts. (See page 24, *post.*)

The Congress did not decide the present issue

The Board purports to fill in the wide gap in its reasoning, by making the following statement:

> "• • • The existence of *the nexus between unfair labor practices* condemned by the Act *and industrial strife* may not be challenged; *it is concluded for all cases* by the finding of Congress in Section 1 of the Act—a finding which was approved by the Court in the *Jones & Laughlin* case." (Board's Brief, page 19; see, also, pages 26-27.)

We urge with conviction that such a plea approaches the taboo of this Court against urging that constitutional causes be decided in an "intellectual vacuum." The "findings" by the Congress in Section 1 of the Act were not made in the light of, or with any consideration for, a case like the present case which involves an all-inclusive State Labor Relations Act lawfully applicable to the employer and which protects the continuity of the petitioners' operations from the consequence of unfair labor practices in every respect as adequately and completely as can be done under the National Act. No State Labor Relations Act had been enacted when the National Act became law. This Court warned, in the *Jones & Laughlin* case (page 30) against "superimposing" on the provisions of the Act "inferences from general legislative declarations of an ambiguous character", contained in Section 1 of the Act.

Nothing in Section 1 of the National Act purports to find that "*the nexus*" to which the Board refers exists, notwithstanding the existence of an applicable all-inclusive State Labor Relations Act. We believe, on the contrary, that it was a purpose, among others, of the Congress in enacting the National Act, to exemplify to the States a pattern of desirable State labor relations legislation which could be copied by them to govern the ever-expanding size and com-

plexity of present-day intra-state industrial relations. Indeed, it is a matter of public record that the National government urged just such exemplary action by the several States, in connection with the enactment of the National Act. The all-inclusive New York State Labor Relations Act, the State's administration of its Act by its Board, and the contractual provisions for the settlement of labor controversies by arbitration and without stopping work, are *realities* in this case. Only by some mechanical process of approach like that employed by the Board may they be ignored as futile and of no force and effect contrary to the principles of this Court as laid down in the *Florida* case.

From this background there seems to be no inconsiderable irony in the Board's attempted reaching for such extension of its jurisdiction, as in this case, in displacement of the New York State Labor Relations Act. Certainly the Congress gave no deliberations (much less made any "findings") concerning such a case. And so we urge again, and with reassurance, how unresolved are the "ifs" in the Board's findings concerning the causal sequence between the alleged unfair labor practices of the petitioners and the interruption or stoppage of interstate commerce of any of their customers; and we further urge that those "ifs" make manifest how remote and indirect is the relation of the former to the latter for any useful or appropriate Federal regulation.

The brief here for the CIO affiliate seems to consider it of some importance that the New York State Labor Relations Act did not become effective until after the initiation of the proceedings against the petitioners by the National Board. This fact is wholly unimportant because the State Act was stipulated by the parties, as a part of the record, on the first day of the hearings (R. 143, 149). The important point is: The State Act had become effective long before the Board's *findings, decision and order*. In short, the availability of the State forum was known to the Board at the time

its hearings started; and the question of the necessity and justification for the National Board's action, *notwithstanding the effect of the State Act*, became vital long before the Board had taken any important final action.

The *Santa Cruz* case not controlling here

The Board further argues that the petitioners' contention that the State law should govern their operations since they are predominantly local is refuted by the decision of this Court in the *Santa Cruz* case. The Board's brief says: "The contention that if, as petitioners allege, the effects of a stoppage of petitioners' operations are predominantly local, the State of New York and not the Federal Government, should control the labor relations in their plants is in direct conflict" with the *Santa Cruz* decision (Board's Brief, page 25).

We already have pointed out in our principal brief why we consider the decision in the *Santa Cruz* case is in no way controlling or applicable in the present case: This Court was not called upon in that case even to consider the effect of the existence of any applicable, all-inclusive State Labor Relations Act; there are no operations, activities, or sales of these petitioners—as there were of the employer in that case—reaching beyond the boundaries of a single State, which might handicap and delimit the effectiveness of a single State in the administration of its Labor Relations Act with respect to the employer; and the decision of the constitutional authority of the Board to intervene in the *Santa Cruz* case seems to us to have involved no possible consideration by this Court of even the intent or purpose, to say nothing of the power, of the Congress to make the National Act effective in such cases to the exclusion and displacement of any State statute. As we understand the reported opinion of this Court in that case, it intended to establish only a further specification of departure from the

former tradition which distinguished "production" from "commerce". An all-inclusive State Labor Relations Act and a State administrative board to carry it out are living facts in this case which were entirely absent in that case.

Statements of the Board in connection with its argument that our position that the effects of the stoppage of petitioners' operations are predominantly local and that the State Labor Relations Act should not be frustrated by the intervention of the National Board is in direct conflict with the decision in the *Santa Cruz* case, also induces the belief that the Board may not appreciate how the predominance and paramountcy of local over National interests should be determined under the yardstick of constitutionality which we have set forth. The Board asserts that Congress has not limited the application of the Act by any concept of "*preponderance of damage*" (Board's Brief, page 27). It also states that "Petitioners' assertion (Br., p. 67) that the interstate aspects of the enterprise were 'dominant' in the *Santa Cruz* case is completely inconsistent with the fact. As a matter of percentages, only 37 percent of the product moved in interstate commerce, while 63 percent of it did not."

In determining the predominance and paramountcy of local over National concern in petitioners' operations in this case, our conclusions are derived from the record in this case and are not dependent upon considerations of "preponderance of damage" nor upon considerations of *percentages* of their customers' production which are moved in interstate commerce. Indeed, in the present case, no part of the production of the employers is moved in interstate commerce and no part of the petitioners' production is destined for any re-sale in any out-of-State markets. What we have shown in our principal brief and what we wish to summarize here for possible further clarification is this:

That the predominance of local over National interest in the continuity of the petitioners' operations is derived only to a comparatively unimportant degree from any dollar and cent considerations, or considerations as to the functioning of mere commercial transactions and operations. We derive the conclusion of the predominance and paramountcy of the local interest in the continuity of petitioners' operations chiefly from considerations of the life, health and safety of the 7,000,000 souls who reside and do business from day to day in the City of New York and adjacent Westchester County and from the undisputed fact of the dependency of the State and City of New York and Westchester County upon their operations in exercising their police powers in behalf of the life, health and safety of those 7,000,000 human beings. Comparatively speaking, only a few kilowatt hours of petitioners' production of electrical energy are required to motivate the police services, the fire services, the sanitation services and the water supply services,[1] or to light the public streets of the City of New York and of Westchester County; *but the very State and City of New York and the County of Westchester are utterly dependent upon the petitioners' service for their fulfillment of these vital functions of local government.* We next derive our conclusion of the predominance and paramountcy of the local over National concern in the petitioners' operations from considerations of the usual *conveniences* which the petitioners' supply of service affords to its millions of residential consumers and its thousands of hospitals, hotels, restaurants, theatres, and commercial customers.

"Essential or appropriate"

The Board's brief, as we read it, does not refute or overcome the substantial number of practical consid-

[1] *Brush* v. *Commissioner*, 300 U. S. 352, 371.

erations which seem to us to demonstrate that, consistently with maintaining a dual system of government at all, it is not *"essential or appropriate"* that the Act be construed so as to uphold the Board's claim of jurisdiction over activities wholly intra-state in character. We emphasize the dependence of the local and State governments and police powers upon the petitioners' services, the predominance of their services to residential and other purely local consumers, and the State and local regulatory measures already effective as to the petitioners' operations and labor relations under the laws of the State of New York.

We point out that in the event of an interruption or threatened interruption of petitioners' services from any cause—hurricane, flood, fire, strike, or whatever contingency—the State and local officers and agencies would be those chiefly and effectively called into action, because of the predominantly local effects of such a contingency and the predominantly local means of dealing with it. *It has seemed to us that considerations of this predominance and paramountcy of the local interest and the local regulation, and the correlative absence of any showing or finding of any inadequacy of the State control or any necessity for superseding State with Federal control, constitute and offer an available judicial measure by which the validity of the Board's claim of jurisdiction should be tested and restrained.* Nevertheless, we find in the Board's brief no adequate reply to these considerations, no awareness that the Act should be construed so that it can "operate within the sphere of constitutional authority", and no suggestion of any rationale other than one which would leave the Board's jurisdiction virtually discretionary with itself.

The Board has not justified its claims

This Court held, in the *Knight* case (192 U. S. 21, 27), that "When service is wholly within a State, it is presum-

ably subject to State control," and that "The burden is on him who asserts that, though actually within, it is legally outside the State; and unless the interstate character is established, locality determines the question of jurisdiction." In the same case, this Court pointed out that

> "Into many relations and transactions there enter elements of a National as well as those of a State character, and *to determine in a given case which elements dominate*, and assign the relation or transaction to the control of the Nation or of the State, is often most perplexing." (Italics ours.)

Certainly the situation here as to these petitioners is not that described in the *Jones & Laughlin* case, as the organization of employers "on a National scale, making their relation to interstate commerce the dominant factor in their activities" (301 U. S. 1, 41). Neither the *Jones & Laughlin* case, nor any other case decided by this Court under the Act, has involved the existence and functioning of a State Labor Relations Act, inclusive of the provisions of the National Act—a comprehensive system of State regulation in no way found or shown to be inadequate for plenary control of the labor practices of the petitioners.

In view of these considerations, we urge with confidence that the Board's brief in no way meets or answers our contention that the action of the Board in this case was in plain disregard of the ruling and *rationale* of this Court in *Florida* v. *United States* (282 U. S. 194), which, as we see it, would temper and restrain all such hasty, drastic and unnecessary attempts[1] to reach out for Federal jurisdiction under circumstances like those here at bar, by requiring in cases like this one "suitable regard to *the principle that whenever the Federal power is exerted*

---

[1] See *Lawrence* v. *St. Louis-San Francisco Railway Company*, 274 U. S. 588, 595.

within what would otherwise be the domain of State power, the justification of the exercise of the Federal power must clearly appear," and must be supported by adequate evidence and findings of appropriate definiteness.

State control the primary factor in stopping industrial strife in intrastate concerns

We turn next to the Board's assumption that if the National Board exercises its jurisdiction against the petitioners to eliminate alleged unfair labor practices by the petitioners, such action is necessary, and will operate, *to prevent* industrial strife which may result in a stoppage of the petitioners' operations and an interruption of their customers' interstate commerce.

We deem it important to identify with some precision the relationship of the functions of the National Board to this anticipatory protection of interstate commerce. It is clear that under the Act the Board performs its functions in the mode of a judicial or quasi-judicial body. After its complaint, it hears evidence as to the alleged unfair labor practices of the employer, and upon the record it is supposed to make its findings, enter its declaratory judgment and issue its injunction to cease and desist with respect to those unfair practices found to have been committed by the employer. As a practical matter the alleged unfair practices will already have occurred *before* any complaint, any judgment, or any injunction by the Board shall have been accomplished.

It is a factual reality in this case that if the petitioners' operations as public utility companies were threatened with interruption from any source whatsoever, *the actual intermediaries to prevent any stoppage of those operations*

would be the New York Mediation Board and the State Labor Relations Board, the Mayor of the City of New York, the Governor of the State of New York and other officials of the State of New York. These practical realities, we feel, fortify us in maintaining that there is no necessity and no justification for the National Board to exercise any jurisdiction under the National Act in displacement of the action of the State Board under the State Act. *There is no showing and there can be no showing that the semi-judicial procedure and the quasi-judicial process of making findings of fact, rendering a declaratory judgment and issuing an injunction to cease and desist, can be accomplished with more effect or greater validity of judgment by the National Board than by the State Board.*

According to the Board: "Petitioners' brief on this point would be much more appropriately addressed to an argument on *the propriety* of Federal regulation than to one on *constitutional power*. On the question of *policy*, the existence of a labor relations act in the State of New York would be a factor to be considered; on the question of *power*, it is wholly irrelevant" (Board's Brief, page 26).

This thesis especially manifests how mechanical the Board would have this Court function in purporting to derive its judgment in this cause. It accentuates the metallic ring of the Board's syllogism which is predicated upon a major premise so remarkably over-simplified for the purposes of this case.

We do not believe, in view of such cases as *Florida* v. *United States*, that this Court is prepared to deny itself all considerations of "*the propriety* of Federal regulation" in this case. We agree that the issue in this cause is that of *power under the Constitution*. But this case is one of those "individual cases" which has arisen under the Act; this Court (not the Board or the Congress) alone can decide

the issue; the issue presents a question which is "one of degree"; it imposes upon this Court the duty of "maintaining the balance of the constitutional grants and limitations" and the duty of determining the question whether or not the Board's action against these petitioners is with *"suitable regard to the principle* that whenever the Federal power is exerted within what would otherwise be the domain of State power, the justification of the exercise of the Federal power must clearly appear."

It seems clear to us that the Constitution and the decisions of this Court thereunder impose upon this Court in this case the necessity of considering with candid deliberation matters of *policy*, explicit and implicit, in the Constitution. Only after this Court shall have determined, with due regard and consideration to such matters of constitutional policy and principle, whether or not the Board *ought* to be allowed to exercise the Federal power which it has attempted in this individual case will the alleged *power* be ascertained or determined. No mere quantitative estimate of the petitioners' operations, no résumé of the relationship of the petitioners with their consumers, whether as a matter of mechanical connection or functional dependence, no mere quantitative estimate of the physical volume or dollar value of commerce carried on by the petitioners' customers, can displace and substitute for the deliberations of this Court upon the question whether or not this Board need and should be sustained in its attempted exercise of authority over the petitioners.

Principal argument of the United brief

The main contention of the brief for the CIO affiliate is best considered in the light of the illustration used at length on page 62 of that brief. The argument is that inasmuch as the Federal government has jurisdiction over the

railroad employee of an interstate railroad, who turns on the electric switch for the operation of a train which will move interstate, the Federal government should have like jurisdiction over the employees (of the petitioners) who produce that electric energy.

Such an argument disregards the fact that the switch is operated by an employee of a carrier which is engaged in interstate commerce and *is not subject to any State Labor Relations Act*, and that his duties are for the purposes of that commerce, whereas the employees of the petitioners are engaged in producing electricity primarily and predominantly for local residential consumers and the fulfillment of the police powers of the localities and the State. Such an argument ignores also the fact that the State has established a plenary and adequate system of regulating the labor relations of the employees of concerns engaged only in intra-state business. The argument of the CIO affiliate thus disregards wholly the principles enunciated in the *Knight* case (192 U. S. 21, 26), as well as in the *Florida* case.

2

As to the Board's Failure to Apprise the Employers and the Brotherhood That the Board Proposed to Determine the Validity and Abrogation of Their Contracts

The brief for the Board seeks to excuse the failure of its complaint to contain even a specific reference to the contracts or bring them "directly in issue." The Board's brief says (page 42) that "at the time it [the complaint] was issued and served none of the contracts had been executed". The complaint was served on May 12th; the Companies' recognition and public announcement (R. 1204-1205) of their contracts with the Brotherhood took place on the preceding April 20th (Board's Exhibits Nos. 13, 13(a) and 14; R. 871).

It is true that the definitive contracts with the seven Local Unions (listed at R. x and xi) were not executed until after May 12th, and we challenge counsel for the Board to state *which one* of the *several amendments* which the Board allowed itself to make of its complaint did bring the contracts "directly in issue" and apprised the Companies and the Brotherhood that the validity of the contracts was attacked and was to be adjudicated. The fact is that no such amendment was ever made.

Counsel for the Board will hardly deny that they have been aware that the invalidity of the contracts was not asserted at the hearings. The printed record of the hearings in this case comprises some 1,316 pages. We challenge counsel for the Board to call to the attention of the Court any specific pages of the record in which it is claimed that the Trial Examiner, counsel for the Board, counsel for the CIO, counsel for the employers, or anyone else, showed an awareness that the validity of the contracts was in issue. We ask that the attention of the Court be called to any statement in which the Trial Examiner or counsel for the Board informed the employers or the Brotherhood that the validity of the contracts was in controversy.

Counsel for the Board asked, on June 9th, for the production of the contracts (R. 868). This was done (R. 869-874); each of the contracts (as listed at R. vi, x, and xi) was "produced at the request of the Board". But counsel for the Board never intimated that he asked for the contracts in order to enable the Board to attack and abrogate them, and in fairness to him we state our belief that he had no such undisclosed purpose.

Counsel for the Board alleges that the employers brought the legality of the contracts into issue by pleading that the contracts with the Brotherhood as a recognized international labor organization made the claims of coercion,

etc., moot. Such a plea was made, *on the last day of the hearings* (R. 1201), and was made BECAUSE *there had been no attack on the validity of contracts with the Brotherhood representing 80 per cent of the eligible employees!*

The Board has not stated that its Trial Examiner was ever aware that the validity of the contracts was being litigated. By withholding from the reviewing Court any report by the Trial Examiner, the Board withheld information as to what the Trial Examiner thought the issues before him were.

Counsel for the Board refers to (Board's Brief, page 46), and has filed with this Court a copy of, the brief which counsel for the employers filed with the Trial Examiner in aid of his preparation of findings. That brief comprised 152 printed pages, and *we shall be glad if members of this Court will refer to it.* That brief does not contain a "point", a page, or a paragraph, of argument on the question of the abrogation of the contracts. On the contrary, it reflects throughout a realization that, however severely the CIO witnesses had attacked some of the labor practices, the regularity and validity of the *contracts* had not been put in issue by the Board. The brief prepared and submitted after the hearings ended will be searched in vain for any discussion of the question of whether the contracts were valid or of the propriety of their abrogation. On the contrary, the whole brief proceeded on the basis that the validity of the contracts had not been attacked. We quote from pages 135 and 136 of that brief:

> "The complaint here, as amended to the close of the trial, does not attack or question the respondents' *recognition* of the I. B. E. W. as collective bargaining agency, nor does it attack or question the respective collective bargaining agreements."
>
> "*No question of representation* as between the I. B. E. W., the C I O; and the independent Union formed last April, *is involved in this case, according to*

statements made in behalf of the Board (S. M. 190 and 521)." (Italics as in original.).

Under those circumstances and *in particular view of the fact that no question had been raised as to the validity of the contracts subsisting in behalf of 80 per cent of the employees,* counsel for the petitioners made the contention quoted on page 46 of the Board's brief. We believed then, and believe now, that it was soundly made.

The Board now says that it examined the brief which the employers submitted to the Trial Examiner to aid his preparation of findings. *If so, the Board was, by the statements above quoted from the brief, made fully aware that the case had been tried and closed on the part of counsel for the employers, upon the basis that "The complaint here, as amended to the close of the trial" did not "attack or question the respective collective bargaining agreements"* (Brief before Trial Examiner, page 135). The Board nevertheless gave the employers no occasion or opportunity to brief or argue any question as to the validity or abrogation of the contracts.[1]

As shown at page 6 of our principal brief, the form of complaint first served stated no charge against the I.B.E.W. under the Act; and no amendment or notice of amendment was ever served on the I. B. E. W. Counsel for the CIO alleges (United Brief, page 2), as the Board's return alleged (R. 1715), that counsel or representatives of the I. B. E. W. came to some of the hearings. The record of the hearings shows no such thing; but if it were true, we ask counsel for the Board to call attention to any day's

[1] The brief for the Board says (page 32) that "Petitioners' brief does not seriously question that this part of the order [for abrogation of the contracts] is within the powers of the Board and is supported by the findings and the evidence." The petitioners do most emphatically question each of these things, for the reasons stated by the Court below (R. 1745-1746), and for the further reason that the provisions of the contracts against all acts of interference with the employees' right to self-organization provide the strongest safeguard against interference with that right (R. 1395, fol. 4185).

proceedings from which any lawyer present would fairly have inferred that the abrogation of the contracts was in contemplation.

3

As to the Board's Attempt to Disassociate, and Then to Condone Severally, Its Numerous and Cumulative Violations of Due Process and "the Rudiments of Fair Play"

On pages 26 and 27 of our principal brief, we assembled and quoted the pointed criticism of the Board's procedure in several respects, as expressed by the Court below. The brief for the Board undertakes no apology or justification for these instances. In our principal brief (pages 70-84) we cited five specifications of action by the Board in the conduct of its proceedings against petitioners, which we urged as severally and cumulatively denying to the petitioners the full and fair hearing required by due process of law. The situation is not that some one or two of these instances transpired under explicable circumstances in a single proceeding; the fact here is that *all of these transgressions of due process were experienced cumulatively by the petitioners in a single proceeding.*

We have urged further that, in view of the interrelation of these instances of improper procedure, no part of the order of the Board should be accorded any judicial enforcement. Our position is essentially this: There is no process of judicial refinement by which these numerous denials of "the rudiments of fair play" could be disassociated from their composite consequences. By the same token, the order resulting collectively from such procedures should be denied enforcement in its every part.

The Board's brief offers no solution of this problem. Its effort seems to be chiefly to take up these numerous instances individually and to suggest, in the first place, that it is insufficient to justify a refusal to enforce the order and, in the second place, that it would not in any event justify a

refusal to enforce more than some part of the order to which the particular offense against due process is claimed by the Board to be related. In other words, the Board's concept denies, and fails to take any account of, the composite effects of the occurrence and recurrence of so many instances of improper conduct in a single proceeding, and fails also to give weight to the fact that the occurrence of so many instances of improper conduct in a single proceeding are the reliable indications by which its bias and pre-judgment can be determined. We submit furthermore, that the nature of each of these violations, the fact of their cumulative occurrence in a single proceeding, and the nature of the Board's apologies for them, leave no doubt that *the conduct of the Board was wilful in each of these respects and beyond the pale of judicial tolerance.*

The Board's brief condones the Board's *ex parte* instructions telephoned from Washington, D. C. to the Trial Examiner at the hearing on June 24th, requiring him to deny the petitioners' request for an adjournment and opportunity to prepare for and present their case on July 6th, except as it authorized the testimony of Mr. Carlisle. Such "remote control" was exercised although no member of the Board had been present at any of the hearings or heard any of the evidence. Its brief also approves the adherence of the Trial Examiner to those instructions by refusing to allow the petitioners to introduce evidence on the date of the final hearing (July 6th) notwithstanding the Board was allowed its omnibus amendment of its complaint on that date, to conform its complaint to all of its proof at the hearing, and the *petitioners specifically asked leave to call witnesses to meet those broadened issues* (R. 1312, 1313, 1316).

The Board argues that these and other of its violations of due process might have been corrected by interlocutory recourse to the Court under Section 10(f) of the Act, by motion to compel the Board to receive additional evidence,

etc. We renew our point that the Act was never intended to provide any *locus poenitentiae* for such arbitrary and unreasonable action. Furthermore, by what principle of due process could the Court ever *sustain* such unreasonable action? This Court should settle once and for all, we submit, the original and inherent illegality of such action, and end all opportunity to put a respondent to the unnecessary and unreasonable expenses of proceedings in the Court to correct such a deliberate denial of opportunity for a full and fair hearing.

We urge that the same considerations are equally applicable to the Board's unreasonable and arbitrary action in refusing to hear petitioners' witnesses who were actually in the hearing room on the last day of the hearings (July 6th). Furthermore, on the facts of this case, we submit that this refusal to hear these witnesses is undeniably symptomatic of such serious partiality of the Board that no known technique of the judicial process could ascertain the extent of its pervasiveness. We urge that neither the Court nor a respondent should be imposed upon by useless litigation to overcome such deliberate and unreasonable violation of right.

We also wish to renew our position upon the significance of the action of the Board in "transferring" the proceeding "to be continued" before itself. If, as the Board appears to contend in its brief (page 57), the combination of Sections 37 and 38 of its Rules gives the Board absolute discretion (1) to *initiate* proceedings against a respondent upon the basis and expectation that there shall be findings and a report of the Trial Examiner to which exceptions may be filed by the respondent (Section 32) *but* (2) the Board may at any time, even after the close of hearings, transfer the proceeding at its pleasure and *ex parte* and thereby obviate all such findings, report and opportunity for exceptions, including any opportunity to appear and be heard

before the Board, such combination should be outlawed by this Court.

By what possible principle of impartiality assured by due process of law may one respondent under the Act be granted and another respondent denied opportunity to be heard upon the findings and report of an Examiner—especially in a case like the present one, where the hearings have been held and closed before an Examiner. Such duplicity of procedure carries its illegality upon its face.

4

As to the Laying Off of the Six Men

The Board's brief seems to us to make no reply to our analysis of the *evidence* as to the laying off of the six men. The brief reiterates about the same version which was in the Board's findings which are here being contested; and we have shown that the evidence does not support the Board's version and that the Board's theory would essentially cripple the competent operation of a public utility enterprise such as that of the petitioners.

The Board's brief persists in the assumption that because these six men who were laid off were officers or members of what is now the CIO affiliate, they must have been laid off for that reason, rather than because of the enforced laying off of a substantial number of men because of decrease in the volume of construction and other work.

Inevitably, in such a process of reduction in forces, some members and officers of the CIO affiliate have been laid off, as have members and officers of the Brotherhood and of the Independent Union. *Hundreds* of members and officers of the Brotherhood Local Unions have been laid off for the same reasons.[1] There had been many lay-offs before

[1] In view of the repeated instances in which the Board's brief (*e. g.*, pages 4, 21, 23, 26) refers to publications outside the record and subsequent to it, we refer here to the fact that on November 10, 1937, *The New York*

these six men were laid off (R. 482, 563, 564, 1263, 1269, 1284); and at the same time, Mr. Dean, who laid them off, laid off two members of what the Board called the "Company Union" (R. 482, 564) and he failed to consider them for employment elsewhere because he knew that he "had a couple of hundred other men to let go" (R. 1283).

Dated: October 14, 1938

Respectfully submitted

WILLIAM L. RANSOM
WESLEY A. STURGES
P. M. BERKSON
Of Counsel

WHITMAN, RANSOM, COULSON & GOETZ
Solicitors for Petitioners
No. 40 Wall Street
New York City

Times and *Herald-Tribune* stated that these Companies and the Brotherhood had agreed to arbitrate, under the contracts in force between them, the laying off of employees. *The total number involved in the lay-offs was 950, of whom 759, or nearly 80 per cent, were members of the Brotherhood.* The arbitration proceeding took place under the laws of the State of New York, and the decision of the arbitrators, as reported in the same newspapers on December 16, 1937, was unanimous. The neutral arbitrator was Dr. John A. Lapp, well-known labor arbitrator; and the representative of the Brotherhood was Dr. M. H. Hedges, labor adviser to the TVA, etc. The unanimous award of the arbitrators, which is of public record under the arbitration law of the State of New York, said, as to the fact that 759 out of the total of 950 laid off were members of the Brotherhood: "The Brotherhood made no claim that the lay-off of employees had been used in any instance 'for purposes of discrimination against any member of the Brotherhood' (Article IX). The reason why members of the Brotherhood were so large a percentage of the total number of employees laid off in October, was obviously that the International Brotherhood of Electrical Workers' membership constitutes a similar percentage of the total employees. The selection of the persons to be laid off was manifestly made without reference to, and without information as to, membership or non-membership in the Brotherhood." The arbitrators found unanimously that there had been no intended violation of the "seniority rule," and "no intended unfairness," in selecting the 754 Brotherhood members laid off. As to the foregoing, see *The New York Times* and *Herald-Tribune* for December 16, 1937.

APPENDIX

Summary and Refutation of Matters of Fact Mis-stated in the Brief for the United (CIO Affiliate and Intervenor)

The Mis-statements	The Record Facts
"In addition, the Consolidated System purchases immense quantities of supplies which come to it in interstate commerce and *it produces large quantities of by-products which go into interstate commerce,—the two items being of such magnitude as to substantially affect interstate commerce.*" (United Brief, page 23.)	The Board found to the contrary, as to the disposition of by-products (R. 72). The petitioners purchase and use materials and supplies which originate outside the State (R. 1366-1367), but no employee of the petitioners is engaged in their transportation in interstate commerce (R. 1368). The Court below found the petitioners were not even claimed to be engaged in "commerce" as defined in the Act (R. 1739).
"* * * Just when they [the so-called Local Unions numbered B-825, B-826, B-828, B-829, B-830, B-832, B-839] came into existence, does not appear clearly from the Record. *The first definite notice of their existence was acquired by the respondents when the employers sought to introduce the alleged contracts in support of their plea that the case had become moot. This did not occur until the hearing had been closed as far as the respondents were concerned,* and remained open only for the employers, for the special	This is completely error. The Board's first and principal witness (Mr. Straub, formerly head of the Employee Representation Plan of the Bronx Company, and later and now Organizational Director of Local 111 of the CIO affiliate), testified *on June 10, 1937,* that a petition for a local charter of the IBEW had been signed April 23, 1937 (R. 242, 245), and that Ganley became its president (R. 248). Straub testified on June 10th that he had attended a meeting of this local at No. 60 East 42nd Street (R. 273, 276).

purpose of adducing certain evidence which was not available at the time of the close of the hearing on June 24, 1937 (R. 1187)." (United Brief, page 3, note.) This would fix the date of the "first definite notice" as July 6th or, at the earliest, June 24th.

On June 9, 1937, the Board's counsel requested the production of the contracts with the IBEW (R. 868), and on June 16th the petitioners' counsel made a statement at the hearing as to the contents of these agreements (R. 870). The contract with Local Union B-829 was, on June 16th, marked for identification as Board's Exhibit No. 14 by the Board's counsel (R. 871, 1394). All of the contracts were "produced at the request of the Board" (R. v, x, xi). Testimony as to the existence of the Local Unions of the Brotherhood was given repeatedly during June, long before June 24th.

"* * * As already stated, these 'contracts' were not produced until after the close of the actual testimony taken at the hearings, and were offered by the respondents in evidence", etc. (United Brief, page 17, note.)

The falsity of this assertion is last above shown.

"In their briefs counsel for petitioners states that the so-called 'local unions' involved herein comprised about 30,000 of their employees out of a possible 40,000, *as if that were a proven fact in the Record.* * * * *This claim was made after the*

The Court below found as a fact, from the evidence, as to the Brotherhood, that "As of June 29, 1937, their membership was 30,000 out of 38,000 eligible employees" (R. 1745). The details of the proofs are in evidence as Respondents'

evidence had been closed, and there was, therefore, no way of contradicting or disputing it." (United Brief, page 19, note.)

Exhibit No. 16 (R. 1418). This exhibit was received in evidence *without objection* from counsel for the Board (R. 1212), who did not cross-examine as to it or offer any rebuttal. The Board's decision did not question the accuracy of the facts shown in Exhibit No. 16 (R. 101).

"* * * Immediately after the announcement by this Court of its decision in the *Jones & Laughlin* case, the petitioners herein got into communication with each other, and this resulted in an announcement by the Consolidated System *to its employees* on April 20, 1937, that Consolidated "recognized' the I.B.E.W. as *the exclusive* bargaining agency for all of its employees, numbering some 40,000." (United Brief, pages 24-25.)

The pertinent factor was that after this Court had upheld the type of legislation represented by the National Act, *the enactment of a State Labor Relations Act became imminent* (R. 1207). The announcement was not at all as stated in the CIO brief. Testimony of Mr. Carlisle as to his negotiations with the IBEW showed that only the latter's members were to be represented (R. 1395). The contracts so provided specifically (R. 1395). On his cross-examination, Mr. Carlisle was asked whether under his understanding of the situation the majority of employees would be barred from being represented if the IBEW only represented a minority. He said (R. 1235):

"A. *No, I wouldn't say that,* but I would say that we have entered into this

agreement and we can consider it a complete compliance with the spirit of the law."

"* * * The Record shows that the agreement of 'recognition' included an agreement for the continuation of the company unions." (United Brief, page 26.)

Neither the contracts nor the record showed or could show any such thing. No reference to the record is cited. The Board dismissed the charge of "domination" and "financial support" (R. 130).

"Assuming, however, that contracts in fact existed, the only parties to these contracts under the laws of New York were the employers and the so-called 'local unions.'" (United Brief, page 28.)

Examination of the contracts show that they were executed by both the IBEW and its local unions, and the latter acted by committees elected by the membership (R. 1394-1405). The Court below upheld the IBEW as a party "aggrieved" and entitled to litigate the abrogation of its contracts.

Statements of Fact in the Board's Brief

THE BOARD'S BRIEF

"* * * On May 17, 1937, petitioners, appearing specially, filed a motion to dismiss the complaint on jurisdictional grounds (R. 19-33)." (Board's Brief, page 4.)

THE RECORD FACTS

The nature of this motion is correctly stated at page 8 of our principal brief as follows: "Immediately after the complaint of the Board had been served, the petitioners appeared specially and on May 17th petitioned the Board (R. 19-33) for a hearing 'directly by the Board' on the question of

jurisdiction and on 'any further proceedings herein' (R. 21, 32), and asked also that the questions of jurisdiction be heard separately and before hearing upon the various charges set forth in the complaint (R. 21, 32)."

"* * * The petitioners herein, in their Memorandum in Support of Motion for a Stay, * * * have acknowledged (p. 5) that 'The I B E W was given notice of the pendency of the proceedings'." (Board's Brief, page 4.)

As counsel for the Board has thus referred to the contents of a paper not before this Court, we quote what the memorandum referred to did say; viz., that "The I B E W was given notice of the pendency of the proceeding, with a copy of the first form of the complaint, but was not made a party and never participated in the proceeding." As shown at page 6 of our principal brief, the form of complaint first served stated no charge against the IBEW under the Act; and no amendment or notice of amendment was ever served on the IBEW.

"Petitioners' claim to a denial of due process insofar as Paragraph 2 of the order is concerned is based upon the refusal by the Board to hear the proffered testimony of two witnesses." (Board's Brief, page 50; see also, pages 2 and 3.)

There is no statement or reference to the application made on behalf of the petitioners on July 6, 1937, for an opportunity to present proof to meet the issues raised by the third amendment allowed on the last day of the hearing (R. 1312, fol. 3935; R. 1313, fol. 3939; R. 1316, fol. 3946). Counsel for

the petitioners, in support of their objection to the arbitrary curtailment of respondent's case, said (R. 1312): "I call your attention also to the fact that over my objection this morning, your Honor allowed the Board, the government, to amend its complaint to conform to proof. *Now, I assert an absolute right under those circumstances to present proof and meet such changes and such issues and facts as your Honor allowed.*"

(7862)